

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JAMES ARTHUR NEWBY,
#1427436

Petitioner,
VS.

RICK THALER,

Respondent.

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CIVIL ACTION NO. G-09-282

ORDER ADOPTING MAGISTRATE JUDGE’S
REPORT AND RECOMMENDATION

Before the Court is the Report and Recommendation of the United States Magistrate Judge that was entered on June 7, 2010. Petitioner has filed his Objections in a timely manner. (Docket Entry (“Dkt.”) No. 15).

Having given this matter *de novo* review under 28 U.S.C. § 636(b)(1)(C), this Court finds that Petitioner’s Objections are without merit and that the Magistrate Judge’s Report and Recommendation should be **ACCEPTED**.

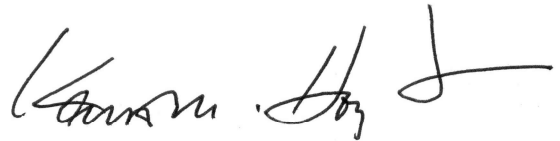
In addition, this Court finds that, because the habeas corpus petition filed in this case is governed by the Antiterrorism and Effective Death Penalty Act, codified as amended at 28 U.S.C. § 2253, a certificate of appealability (“COA”) is required before any appeal may proceed. *See Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir.) (noting that actions filed under either 28 U.S.C. § 2254 or 2255 require a certificate of appealability), *cert. denied sub. nom. Monroe v. Johnson*, 522 U.S. 1003 (1997). “This is a jurisdictional prerequisite because the COA statute mandates that ‘[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals’” *Miller -El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing 29 U.S.C. § 2253(c)(1)).

A district Court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). Because the exhaustion prerequisite to federal habeas corpus review is well-established, the Court concludes that jurists of reason would not debate whether the procedural ruling in this case was correct. Therefore, a certificate of appealability will not issue in this case.

Accordingly, it is **ORDERED** that the Respondent's Motion for Summary Judgment (Dkt. No. 9) is **GRANTED**; that the Petition for a Writ of Habeas Corpus of James A. Newby (Dkt. No. 1) is **DISMISSED** with prejudice; and a certificate of appealability is **DENIED**.

It is the further **ORDER** of this Court that any and all further relief requested is **DENIED**.

SIGNED at Houston, Texas this 27th day of July, 2010.

A handwritten signature in black ink, appearing to read 'Kenneth M. Hoyt', written over a horizontal line.

Kenneth M. Hoyt
United States District Judge